

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 18-1387 T

(Senior Judge Charles F. Lettow)

JOHN W. BARRY, ET AL.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER
JURISDICTION

Pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, moves to dismiss the complaint for lack of subject matter jurisdiction. Defendant's motion is supported by the following factual grounds and legal principles:

BACKGROUND

Procedural History

On September 7, 2018, plaintiffs filed a complaint in the United States Court of Federal Claims. On September 28, 2019, plaintiffs moved to amend their complaint, adding to their

original pleading additional plaintiffs¹ and defendants.² (*Compare* Docket No. 1, with Docket No. 4.) On October 3, 2018, the United States moved for an order requiring plaintiffs to file a properly redacted version of the complaint and its attachments for the public record. *See* RCFC 5.2(a). The Court granted the motion, and, on November 27, 2018, December 11 2018, December 13, 2018, and January 2, 2019, plaintiffs filed redacted and partially redacted exhibits in support of their complaints. Plaintiffs also filed “Motions to Claim and Exercise Constitutionally Secured Rights and Require the Presiding Judge to Rule Upon this Motion and Compel All Public Officers of This Court to Uphold Said Rights Pursuant to Their Oaths of the Constitution.” (*See* Docket Nos. 15–33, 36, 37, 43.) On November 29, 2018, defendant moved for a second enlargement of time, requesting until January 11, 2019 to answer plaintiffs’ amended complaint.³

¹ The plaintiffs named in the caption of the amended complaint are as follows: John W. Barry, Karrine N. Montaque, Moses Nelson, Joel Adeyemi Omotosho, Julio Ruiz, Patricia Hinds, Elba M. Viera Lopez, Carl McBean, RoseMarie M. Lastimado-Dradi, Elvah Bliss Miranda, Daniel B. Miranda, Marciaminajuanequita R.T. Dumlaio, Rosalie O. Libanag, Rodrigo B. Libanag, Hannah K. heart, Brigada E. Chock, Michael T. Chock, Leoncio Bautista, Scott F. Hawver, Beverly Braumuller-Hawver, Paul K. Meyer, Eurich Z. Griffin III, Barbara W. Griffin, Rose Ann Flor, McKinley Lewis, Barbara L. Gasich, Annette Torruellas, Sheryl Tinoco, Radames Rodriguez, Jeanette Delgado, Aaron Aqueron, Benedicta Sison, Betty Ananyo, Rafael Ramos, Ada De La Cruz, Hector Mendez, Donnie Mendez, Mark Goolsby, Jose Valez, Magdalena Nieves, and Juanito Estrada.

² Separately from this motion, defendant moves to amend the caption of plaintiffs’ amended complaint to exclude all individually named defendants with the exception of the only proper defendant—the United States. “It is well settled that the United States is the only proper defendant in the Court of Federal Claims.” *Cox v. United States*, 105 Fed. Cl. 213, 216 (2012) (citing 28 U.S.C. § 1491). Any additional defendant named in a lawsuit in this Court that is not the United States must be ignored. *See Sherwood v. United States*, 312 U.S. 584, 588 (1941). Accordingly, the focus of this motion is on claims against the only possible defendant, the United States.

³ Plaintiffs also moved for Default Judgment against the United States after defendant moved for its Second Enlargement to Answer or Otherwise Respond to plaintiffs’ amended complaint. Defendant submits response to that motion separately from this motion to dismiss.

At midnight on December 21, 2019, the continuing resolution that had been funding the Department of Justice expired and appropriations to the Department lapsed. In light of the lapse in appropriations, defendant moved to stay the case proceedings until the Department of Justice was funded and defendant's counsel was allowed to continue to work on this case. The Court granted the defendant's request to stay the deadline to answer or otherwise respond to the amended complaint and asked defendant to file a status report within four days of the restoration of appropriations, which occurred on January 25, 2019. During the lapse in appropriations, plaintiffs continued to file many motions, including motions to strike defendant's motion for stay, and, once the request for stay was granted, motions to vacate the order granting the motion to stay.⁴ (See Docket Nos. 91–114). On January 25, 2019, Congress passed a continuing resolution providing restored funding for the Department of Justice. Defendant hereby moves to dismiss plaintiffs' complaints because this Court lacks subject matter jurisdiction to review any of plaintiffs' claims. See RCFC 12(b)(1).

Plaintiffs' Allegations

In support of their complaints, plaintiffs have submitted thousands of pages in attached declarations, affidavits, and court filings from previous cases. In summary, the "Statement of Facts and Law Giving Rise to Plaintiff's [sic] Causes of Action" describe a scheme in which plaintiffs have filed petitions with the United States Tax Court against defendants "for their pernicious *ultra vires* acts without lawful authority." (Am. Compl. ¶ 94.) Plaintiffs then attach to their pleadings copies of motions filed by respondent, the Internal Revenue Service, in which respondent moved to dismiss those petitions because no notice of deficiency sufficient to confer

⁴ Plaintiffs' motions to strike the motion to stay and vacate the Court's order granting in part the motion to stay are moot, as the appropriations that fund the Department of Justice have been restored and the stay of proceedings has ended.

jurisdiction was sent to petitioners in the applicable tax years of those motions. (*See id.* ¶ 96.)

Plaintiffs contend that because of dismissals of their petitions in the United States Tax Court, the *Internal Revenue Service* was somehow without authority to pursue the collection of tax against plaintiffs.⁵ In their words, plaintiffs claim the Internal Revenue Service does “not have jurisdiction and authority to implement their heavy handed collection actions they already initiated against Plaintiffs which has caused Plaintiffs great harm and irreparable injury.” (*Id.* ¶ 99).

Plaintiffs identify nine separate causes of action: I. Intentional Interference with Person and Invasion of Privacy; II. Intentional Interference with Property, Trespass to Land, Trespass to Chattels and Chattel Paper Instruments; III. Violations of Procedural and Fundamental Due Process of Law; IV. Violations of Civil Rights pursuant to *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, and the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution; V. Abuse of Process; VI. Violations of the Fair Debt Collection Practices Act (FDPA), 26 U.S.C. § 7214, et. Seq.; VII. Joint Tortfeasor Liability; VIII. Intentional Infliction of Emotional Distress and Mental Anguish; IX. Defamation, Libel, and Slander. For each identified Count, plaintiffs seek \$1,000,000.000 in compensatory and punitive damages per plaintiff and \$100,000.00 in statutory damages per plaintiff. Plaintiffs also request equitable relief of a “full and fair plenary adjudicative process of Agency Review under 5 U.S.C. §§ 701–706.” (*See Am. Compl. “Equitable Relief Requested”*).⁶

⁵ This argument is, of course, frivolous.

⁶ The Court of Federal Claims lacks jurisdiction to review final agency decisions under the Administrative Procedure Act. *See Martinez v. United States*, 333 Fed. Cl. 1295, 1313 (Fed. Cir. 2003).

ARGUMENT

The Court of Federal Claims is a Court of Limited Jurisdiction

Before a federal court can consider the merits of a claim, subject-matter jurisdiction must be properly established. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Plaintiff “bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.” *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). Like all federal courts, the United States Court of Federal Claims is a court of limited jurisdiction. *See Cooper v. United States*, 123 Fed. Cl. 226, 231 (2015); *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1461 (Fed. Cir. 1998).

The Tucker Act, 28 U.S.C. §1491, expressly waived the sovereign immunity of the United States with respect to certain monetary claims against the United States government. *See* 28 U.S.C. § 1491(a)(1); *Cooper*, 123 Fed. Cl. at 231. In relevant part, the Tucker Act invests the Court of Federal Claims with jurisdiction over:

any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Tucker Act does not create independent substantive rights. *Cooper*, 123 Fed. Cl. at 231. Therefore, to come within the Tucker Act’s jurisdiction, “a plaintiff must identify a separate source of substantive law that creates the right to money damages.” *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 875 (Fed. Cir. 2007) (internal quotation marks omitted). Indeed, the claim “must be one for money damages against the United States, and the claimant must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.”

United States v. Mitchell, 463 U.S. 206, 216-17 (1983) (internal quotation marks and citations omitted).”

One such claim for money damages that is viable in the Court of Federal Claims is a suit for tax refund under I.R.C. § 7422. Section 7422 of the I.R.C. provides authority for taxpayers to file suit to recover “any internal revenue tax alleged to have been erroneously or illegally assessed or collected,” but only after “a claim for refund or credit has been duly filed with the Secretary.” The I.R.C. imposes a limitation of time in which a taxpayer may file a valid refund claim with the Secretary, in § 6511(a)—that is, three years from the time the return was filed *or* two years from the time the tax was paid, whichever period expires later. *See* I.R.C. § 6511(a). *See also United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 5 (2008).

Unless a claim for refund is filed with the Secretary during the time period imposed in § 6511(a), a suit for refund in federal court under § 7422 cannot be maintained. *See id.* “Read together, the import of [§§ 7422 and 6511(a)] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been ‘erroneously,’ ‘illegally,’ or ‘wrongfully collected.’” *United States v. Dalm*, 494 U.S. 596, 602 (1990). Therefore, for this Court to have subject-matter jurisdiction over a claim for tax refund, the claimant must have timely filed his or her claim for refund with the Service within the time limit imposed under the Code. The burden is on plaintiff to prove that this Court has subject matter jurisdiction over his claim. *See Davis v. United States*, 43 Fed. Cl. 92, 94 (1999). In addition, pursuant to I.R.C. § 6532(a)(1), a taxpayer must file suit for refund no later than two years from the date of mailing of a notice of claim disallowance.

Plaintiffs' Allegations Fail to Demonstrate any Basis for This Court to Exercise Jurisdiction

I. Plaintiffs Have Not Alleged Facts Supporting the Existence of Valid Refund Claims
Against the Internal Revenue Service

The underlying activities giving rise to the plaintiffs' grievances are, by their contention, unauthorized collections actions. However, "this court's jurisdiction under the Internal Revenue Code is generally limited to the adjudication of tax refund suits, *see* 26 U.S.C. § 7422, and this is not such suit." *Dawveed v. United States*, No. 14-247, 2014 WL 1499145, *1 (Fed. Cir. April 15, 2014). Nowhere in plaintiffs' complaints have they alleged that they have satisfied the jurisdictional requirements to pursue suit seeking refund of taxes. Rather, plaintiffs' lawsuits arise from grievances they perceive involving the collection of taxes—claims lying wholly outside the jurisdictional authority of the Court off Federal Claims.

Section 7433 of the Internal Revenue Code (I.R.C.) provides taxpayers the right to bring a civil action for damages against the United States in a district court of the United States where, in pursuing the collection of federal tax, an officer of the IRS recklessly, intentionally, or negligently disregarded a provision of the Internal Revenue Code. But this Court is not a district court of the United States; therefore, it lacks jurisdiction over claims under Section 7433. *See Ledford v. United States*, 297 F.3d 1378, 1382 (Fed. Cir. 2002). The same is true of plaintiffs' claims under the Fair Debt Collection Practices Act (FDCPA) (*See* Count VI)—Congress vested jurisdiction to hear such claims with the District Courts of the United States; therefore "this court cannot hear them." *Powers v. United States*, 14-760C, 2015 WL 4931482, at *6 (Fed. Cl. Aug. 18, 2015).

II. Plaintiffs' Claims Sounding in Tort (Counts I, II, III, V, VI, VII, VIII, and IX) Must Be Dismissed Because This Court Cannot Exercise Jurisdiction Over Such Claims

The majority of claims alleged in plaintiffs' complaints sound in tort: intentional interference with person and property; invasion of privacy; trespass to chattels; abuse of process; intentional infliction of emotional distress; and defamation, libel, and slander. Such claims sounding in tort and arising from common law are outside the exclusive jurisdiction granted to the Court of Federal Claims by Congress. Therefore, "it is *beyond dispute* that the Court of Federal Claims has no jurisdiction over claims which lie in tort." *Minehan v United States*, 75 Fed. Cl. at 259 (emphasis added). "[T]he law is clear that allegations regarding bad faith or fraudulent actions by government officials or agencies do sound in tort." *Id.* See also *Cycenas v. United States*, 120 Fed. Cl. 485, 498 (2015) ("To the extent plaintiff's complaint asserts claims of conspiracy, misrepresentation, identity theft, mortgage fraud, credit theft or fraud, and trespass, those claims sound in tort, or allege criminal conduct. As such, this court lacks jurisdiction to adjudicate those claims."). Accordingly, plaintiffs' claims sounding in tort must all must be dismissed for lack of subject matter jurisdiction.

III. Plaintiffs' Claims Alleging Constitutional Violations (Counts III and IV) Must Be Dismissed Because This Court Cannot Exercise Jurisdiction Over Such Claims

Plaintiffs allege they have suffered deprivations of their procedural and due process rights secured under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution by, primarily, their subjection to the collection actions taken by officers of the I.R.S. However, neither the Due Process Clause under the Fifth nor Fourteenth Amendment is money-mandating; therefore, "they do not provide a basis for jurisdiction in this court." *Cox v. United States*, 105 Fed. Cl. 213, 217 (2012). Nor does the Fourth Amendment's prohibition against unreasonable

searches or seizures “mandate the payment of money damages.” *Id.* “Therefore, [the Fourth Amendment’s Search and Seizure Clause] cannot provide a basis for jurisdiction in the Court of Federal Claims.” *Id.* In addition, because the Court of Federal Claims solely exercises jurisdiction over cases involving claims against the United States, this court also does not have jurisdiction over suits against “individual federal officials” under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 391–94 (1999). *Cunningham v. United States*, 479 Fed. Appx. 974 (Fed. Cl. 2012) (citation omitted); *Brown v. United States*, 105 F.3d. 621, 624 (Fed. Cir. 1997).

Plaintiffs further allege violations under 18 U.S.C. §§ 241 and 242, which are criminal statutes setting punishments for criminal conspiracies that deprive civil rights. “These statutes “are criminal statutes that provide no basis for a civil action in any court.” *Hardin v. United States*, No. 15-585C, 2015 WL 6437379, at *4 (Fed. Cl. Oct. 22, 2015).

V. Plaintiffs’ Claims Alleging Civil R.I.C.O. Violations Must Be Dismissed Because This Court Cannot Exercise Jurisdiction Over Such Claims

In the caption of their complaints, Plaintiffs identify the lawsuits as “Class Action Civil R.I.C.O. Complaint[s].” However, an agency of the United States cannot commit a crime actionable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 (2004). *Wolf v. United States* 127 F. App’x 499, 501 (Fed. Cir. 2005). “The United States cannot be liable for criminal acts under RICO.” It follows, “[t]herefore, [that the United States] cannot be liable for damages under the civil RICO provisions.” *Id.*

CONCLUSION

WHEREFORE, based on all of the reasons set forth above, defendant requests that the Court enter an order dismissing the complaints for lack of subject matter jurisdiction. *See also*

Def. Mot. To Amend Caption, Filed Simultaneously on January 31, 2019 (relating to the removal of improperly named individual defendants from plaintiffs' captions).

Respectfully submitted,

January 31, 2019


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CERTIFICATE OF SERVICE

I certify that service of the foregoing document has this 31st day of January 2019, been made on each of the following plaintiffs, *pro se*, by mailing a copy thereof, in a postage prepaid envelope, to the following addresses:

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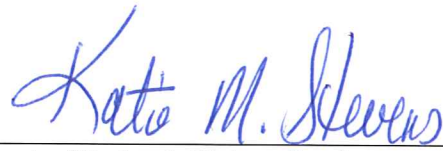
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